Nos. 79-1538 and 79-1596

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD PAUL HODEL,
ACTING SECRETARY OF THE INTERIOR, APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., APPELLANTS

v.

DONALD PAUL HODEL,
ACTING SECRETARY OF THE INTERIOR, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR THE ACTING SECRETARY OF THE INTERIOR

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 6
Permanent Surface Mining Regulation Litigation, In re, 14 E.R.C. 1083, appeals pending, Nos. 80-1810 *et seq.* (D.D.C., filed Aug. 26, 1980) 5
United States v. *Polino*, 131 F. Supp. 772 6

Constitution and statutes:

United States Constitution:

Article I, Section 8, Clause 3 (Commerce Clause) 2, 3
First Amendment 4
Tenth Amendment 2

Clean Air Act, 42 U.S.C. (Supp. I) 7401 *et seq.* 4
Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* 4
Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445, 30 U.S.C. (Supp. I) 1201 *et seq.*:

Section 515(c), 30 U.S.C. (Supp. I) 1265(c) .. 3
Section 515(e), 30 U.S.C. (Supp. I) 1265(e) .. 3
Section 521, 30 U.S.C. (Supp. I) 1271 7
Section 521(a)(2), 30 U.S.C. (Supp. I) 1271(a)(2) 7, 8
Section 521(a)(3), 30 U.S.C. (Supp. I) 1271(a)(3) 7, 8, 9
Section 522(e), 30 U.S.C. (Supp. I) 1272(e) .. 5, 6
Section 525(a), 30 U.S.C. (Supp. I) 1275(a) .. 9
Section 525(c), 30 U.S.C. (Supp. I) 1275(c) .. 9

Miscellaneous:

44 Fed. Reg. 14993 (1979) 6
30 C.F.R. 761.5(a)(2)(i), 44 Fed. Reg. 15342 (1979) 5
H.R. Rep. No. 93-1072, 93d Cong., 2d Sess. (1974) .. 4
H.R. Rep. No. 95-218, 95th Cong., 1st Sess. (1977) 6

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1538

DONALD PAUL HODEL,
ACTING SECRETARY OF THE INTERIOR,* APPELLANT

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

No. 79-1596

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL., APPELLANTS

v.

DONALD PAUL HODEL,
ACTING SECRETARY OF THE INTERIOR, ET AL.*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR THE ACTING SECRETARY OF THE INTERIOR

In large measure, plaintiffs' brief fails to address the arguments advanced by the Secretary of the Interior in support of the Surface Mining Act. We therefore continue to rely primarily on the views ex-

---

* The Secretary of the Interior has disqualified himself in this case.

pressed in the principal brief for the Secretary. We respond briefly to several of plaintiffs' contentions that in our view misdirect the judicial focus in this litigation or inject an element of factual confusion into the controversy.

1. In the first place, plaintiffs repeatedly attempt to treat this case as if it were an essentially factual dispute in which the Secretary's success on appeal depends on his ability to demonstrate that the district court's findings of fact are clearly erroneous (see, *e.g.*, Va. Br. 2-3, 5-6, 37-40). This is inaccurate. Plaintiffs are the parties challenging the constitutionality of an Act of Congress, and they therefore bear the heavy burden of establishing that the explicit and implicit legislative findings on which the statute is based are irrational. When the validity of a federal statute is at stake, a district court does not sit to try facts as it would in a criminal prosecution or a negligence suit. The court's inquiry is of a different character altogether. And, on appellate review, the question is not whether the district court's factual findings are clearly erroneous but whether the district court properly resolved the legal dispute regarding the existence *vel non* of a rational basis for the challenged legislative action.

2. The other main prong of plaintiffs' attack on the Surface Mining Act is the argument that the Act affects "land use" and that it therefore impermissibly exceeds congressional power under the Commerce Clause and invades the area reserved to the states under the Tenth Amendment. But there is no constitutional magic associated with the phrase "land use." The Constitution does not prohibit Congress from passing laws affecting land use, and it does not provide that states and local governments may exercise exclusive control over land use regula-

tion. The cases on which plaintiffs rely (Va. Br. 30) merely establish that state and local governments enjoy broad authority to regulate land use; they do not hold that Congress lacks power to enact measures affecting land use, even when those measures are rationally related to a legitimate governmental purpose within the powers delegated to Congress by Article I of the Constitution. In short, this case does not turn on whether the Surface Mining Act can or cannot be characterized as a "land use" measure. The question is rather whether Congress may properly regulate surface mining methods in the exercise of its Article I powers. If it can, any incidental effects on land use are irrelevant to the constitutional dispute.

3. Plaintiffs' criticism (Va. Br. 31-33) of the "steep-slope" variance procedure in Section 515(e) of the Act is unavailing. Plaintiffs complain that Section 515(e) does not offer a meaningful opportunity for divergence from the "approximate original contour" requirement because the statute in any event requires that the highwalls of reclaimed mining cuts be completely covered. This objection is both premature and incorrect. Plaintiffs have not identified a single instance in which the statutory obligation to cover the highwall has prevented a mine operator from making profitable use of a variance. Moreover, there is no reason to believe, as an *a priori* matter, that, after the highwall has been completely covered, flat bench land will not remain in sufficient quantities to permit commercial or residential development. In addition, plaintiffs' argument ignores the availability of variances under Section 515(c) of the Act, the provision governing variances when the mountaintop removal mining method is used. Finally, and perhaps most important, plaintiffs simply refuse to acknowl-

edge that, once statutorily required reclamation has been released, the mined lands may be used for any purpose whatever. If flat bench land is truly as valuable as plaintiffs contend, there should be no financial impediment to the reestablishment of flat areas on the sites of old mining cuts, once those areas have been restored and stabilized in the manner described by Congress.

4. Plaintiffs further contend (Va. Br. 33-35) that the Surface Mining Act is unconstitutional because "less intrusive means" could have been used by Congress to control the adverse effects of surface mining. Indeed, plaintiffs suggest that, even before enactment of the Surface Mining Act, the salutary aims of the statute were adequately served by the Clean Air Act, 42 U.S.C. (Supp. I) 7401 *et seq.*, and the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* The short answer to this argument is that Congress rejected it. The effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment. At least in situations where no racial, ethnic, or otherwise suspect classifications are involved and no First Amendment interests are implicated, Congress is not obliged to proceed by adopting the minimal form of regulation that arguably could suffice to produce the desired result. And, in any event, here Congress expressly considered the effectiveness of existing legislation and concluded that additional measures were necessary to deal with the adverse effects of surface mining operations. See, *e.g.*, H.R. Rep. No. 93-1072, 93d Cong., 2d Sess. 123-124 (1974). Plaintiffs' argument therefore is neither factually nor legally adequate to justify invalidation of the Surface Mining Act.

5. Plaintiffs' discussion (Va. Br. 48) of the "valid existing rights" provision in Section 522(e) of the Act is misleading. Under Section 522(e), the restrictions on surface mining operations near roads, schools, churches, parks, public buildings, and cemeteries are expressly made "subject to valid existing rights." Plaintiffs assert (Va. Br. 48) that this exception "applies only to specific surface mining operations for which all required permits were issued prior to August 3, 1977, the effective date of the Act * * *." The language of Section 522(e) does not say that "valid existing rights" may be recognized only where all required permits were obtained before August 3, 1977. Plaintiffs cite no authority for their interpretation, but it is apparently based on 30 C.F.R. 761.5 (a)(2)(i), 44 Fed. Reg. 15342 (1979), a regulation promulgated to implement Section 522(e) during the Act's permanent phase. That regulation, however, has been remanded to the Secretary by the United States District Court for the District of Columbia, the court vested with exclusive jurisdiction to review the regulations promulgated under the Surface Mining Act. See *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. 1083, 1091 (D.D.C. Feb. 26, 1980), appeals pending, Nos. 80-1810 *et seq.* (D.C. Cir., filed Aug. 26, 1980). The Secretary did not appeal this aspect of the district court's decision, and the regulation is not now effective. (Even before the decision, the Secretary did not interpret the regulation to make pre-enactment issuance of all necessary permits a *sine qua non* for recognition of "valid existing rights" under Section 522(e). The regulation was intended to provide only that one way in which a mine operator could conclusively establish his "valid existing rights" was to show that all necessary permits had

been obtained before passage of the Act. 44 Fed. Reg. 14993 (1979).) The Secretary is now considering the appropriate content of a revised regulation on the subject. The limited legislative history of Section 522(e) makes it reasonably clear that Congress used the phrase "valid existing rights" to include more than those surface mining operations that had actually received permits before the date of the statute. See H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 95 (1977), citing *United States* v. *Polino*, 131 F. Supp. 772 (N.D. W. Va. 1955).

6. Plaintiffs' comments regarding the Tucker Act and *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), misinterpret the Court's opinion in that case. Appellees in *Duke Power* objected to the Price-Anderson Act on two theories. They contended that the statute violated both the Due Process Clause and the Just Compensation Clause of the Fifth Amendment. 438 U.S. at 69. The Court ruled that the potential availability of a Tucker Act remedy in the Court of Claims for any uncompensated taking of property effected by the challenged statute did not deprive the district court of *jurisdiction*, under 28 U.S.C. 1331, to consider appellees' constitutional claims. 438 U.S. at 71 n.15. But, because of the Tucker Act option, the Court found it unnecessary to address the *merits* of appellees' Just Compensation Clause argument or the propriety of granting equitable relief to remedy an uncompensated taking. *Id.* at 94 n.39. The Court's approach in *Duke Power* thus supports the view expressed in the Secretary's principal brief (Br. 58-60) that any taking of a particular parcel of property allegedly effected by the Surface Mining Act is not unconstitutional unless just compensation is unavailable and that therefore declaratory and injunctive relief should not be awarded unless and until

the plaintiff or plaintiffs allegedly injured by a particular taking have established that their legal remedies are inadequate. The Secretary did not assert that the possibility of a monetary recovery under the Tucker Act defeats the jurisdiction of this Court or the district court; he suggested only that, where the Tucker Act option has not been explored, it may be premature for this Court to resolve the merits of the taking question.

7. Plaintiffs contest (Va. Br. 52) the accuracy of the Secretary's statement (Br. 62) that "[p]laintiffs did not allege that they, or any one of them, received a summary cessation order under Section 521(a)(2) or suffered loss as a result. Nor was any such showing of harm made at trial." In challenging this assertion, plaintiffs rely solely on three cessation orders issued to plaintiff Paramont Mining Corporation. See J.S. App. 65a-66a. But no allegations regarding those cessation orders are contained in plaintiffs' complaint, and the record is silent on the question whether the orders were *summary* cessation orders issued under Section 521(a)(2) or ordinary cessation orders issued after a notice of violation and expiration of an abatement period under Section 521(a)(3). See the general explanation of the cessation order procedures at pages 60-62 of the Secretary's principal brief. The district court's amended order enjoins Section 521 of the Act "*only* insofar as [it] relate[s] to summary issuance of cessation orders" (J.S. App. 2a; emphasis in original). Plaintiffs did not attempt to introduce the Paramont cessation orders into evidence, and the trial testimony does not disclose the nature of the orders. See Pr. Tr. 131-137; Tr. 683-686.[1]

---

[1] "Pr. Tr." refers to the transcript of the preliminary hearing in February 1979.

In fact, an examination of the three cessation orders issued to Paramont reveals that only one of the three orders was issued under Section 521(a)(2); the remaining two orders were issued under Section 521(a)(3).[2] The one summary cessation order (No. 78-I-15-1, issued Aug. 16, 1978) was issued because Paramont allegedly was conducting surface mining operations in an area for which it had not obtained a permit. No evidence in the record shows that Paramont suffered any significant financial loss as a result of the issuance of that cessation order.[3]

The district court's mistaken conclusion that Paramont had suffered a great financial loss as the result of the issuance of a summary cessation order was based on an order issued on January 4, 1979 (No. 79-I-19-1). See Tr. 684-685. An examination of that cessation order reveals, however, that it was issued under Section 521(a)(3) and not under Section 521(a)(2). It was not, in other words, a summary cessation order. The order was issued for the failure to abate a violation concerning which a notice of violation had been issued on November 27, 1978.[4] The notice stated that abatement should be completed

---

[2] Copies of the three orders have been lodged with the Clerk of this Court.

[3] An administrative law judge ruled that the summary cessation order was improper because the lack of a permit did not necessarily establish the "imminent danger" to health and safety or the reasonable expectation of "significant, imminent environmental harm" required by Section 521(a)(2) as a precondition for summary administrative action. A copy of the administrative law judge's decision and order has been lodged with the Clerk of the Court.

[4] A copy of that notice of violation (No. 78-I-19-7) has also been lodged with the Clerk of this Court.

by December 27, 1978. At any time after November 27, 1978, Paramont was entitled to request a public hearing under Section 525(a) of the Act and to request temporary relief from the Secretary under Section 525(c). It did not do so. Whatever harm Paramont may have suffered after issuance of the Section 521(a)(3) cessation order on January 4, 1979, it was not attributable to the summary cessation order procedure attacked in this litigation and invalidated by the district court. The Paramont cessation orders therefore provide no support for plaintiffs' challenge to the accuracy of the statements made in the Secretary's opening brief.

For these reasons, and the reasons stated in the principal brief for the Secretary, the judgment of the district court should be reversed as to all questions before the Court, except the Commerce Clause question raised by plaintiffs' appeal in No. 79-1596. In that respect, the judgment should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 338091 257